

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARY B. SMITH,
Plaintiff

vs.

DAVID C. NICHOLSON, TRUSTEE
OF THE D.J.J. REALTY TRUST,
DOMINIC M. SAWICKI,
TRUSTEE OF THE DOMINIC M.
SAWICKI NOMINEE TRUST,
AND CAROL ANN WHITNEY
AND GLENN WHITNEY,
Defendants

CIVIL ACTION NO.: 04 CV 10632 MEL

**DEFENDANTS, DAVID C. NICHOLSON, TRUSTEE OF THE D.J.J. REALTY TRUST,
DOMINIC M. SAWICKI, TRUSTEE OF THE DOMINIC M. SAWICKI NOMINEE
TRUST, CAROL ANN WHITNEY AND GLENN WHITNEY'S
JOINT MOTION FOR SUMMARY JUDGMENT**

EXHIBIT 3

1 A. It's a gradual steep, gradual
2 decline, I guess, down to that first landing.
3 It is a little steeper at the bottom of that
4 towards that landing. And from there down to
5 the second area where the dogs, I mean the
6 house is, at least the garage and everything,
7 it's really steep.

8 Q. And is it your testimony that Mrs.
9 Smith fell on this area where it was a gradual
10 decline?

11 A. Yes, definitely.

12 Q. And do you recall if the decline had
13 already started when she had fallen?

14 A. Yes, I would say it did.

15 Q. Do you know about how many feet past
16 sort of the crest of the hill before it
17 declines she fell?

18 A. No. I could never make that call
19 because it's so gradual. I don't know what
20 would be the start of it. I mean from, I
21 guess from the very top of that driveway, it
22 starts to get gradual, but it's not bad in the
23 beginning and then kind of, as I recall. I
24 would love to walk the property again.

1 Q. Could you describe to me how she
2 fell?

3 A. Sure. She, it seems to me like her
4 left foot, perhaps one of her feet literally
5 rolled out from under her as if she had
6 stepped on a gravel rock of some sort and she
7 fell not too hard. I remember thinking oh,
8 she might be okay. But, of course, given her
9 age, no fall is going to be, probably going to
10 be okay.

11 But it wasn't, it kind of looked
12 liked like her feet just went out from under
13 her. It didn't look like she tripped over a
14 branch or tripped over someone's leg. It
15 looked like her feet just went out from under
16 her, as if she had stepped on a bowling ball
17 and it just went out.

18 And she fell to her left, I think.
19 My wife and I disagree on that one, too, but I
20 can remember -- although, yes.

21 Q. And you were standing behind her, so
22 from your point of view she had fallen to her
23 left side; is that correct?

24 A. Yes.

1 while she was still on the ground, as to what
2 she may have fallen over?

3 A. I don't think so, not that I
4 remember.

5 Q. When you approached the situation and
6 Mrs. Smith, did you happen to look around to
7 see if maybe Mrs. Smith fell on anything?

8 A. I think I might, I was aware of the
9 surroundings. I was aware of the situation.
10 She was in a particularly rocky section, but
11 then again, that's like I said earlier, that's
12 why I was concerned anyways.

13 You know, we were approaching the,
14 one of the sections where it's all broken up
15 on the right side.

16 Q. So it was obvious to you before you
17 were approaching it that it was a broken-up
18 and rocky section?

19 A. Yes.

20 Q. You didn't see any particular rock or
21 gravel that Mrs. Smith might have fallen over
22 or on?

23 A. No. I don't remember the exact
24 piece. There was not a big giant piece or

1 bowling-ball size piece.

2 Q. Do you recall if the EMTs approached
3 the scene at that point in time?

4 A. It was a while afterwards. I was
5 inside. So I mean, I think I might have
6 glanced out and they were there. We all
7 rushed up to see if we could help and then
8 someone went inside, might have been me, I
9 forget, someone went inside and said, "We have
10 to call an ambulance."

11 They called an ambulance, and I
12 went inside myself because there was nothing I
13 could do. And I pretty much lost track of the
14 scene. I think I looked out and there was
15 paramedics with the stretcher thing or the
16 ambulance, I think, backed right up to it.

17 But either way, I was not really
18 there when it came. That was a good 15
19 minutes afterwards.

20 Q. Okay. So you were not actually on
21 the scene when the ambulance came; is that
22 correct?

23 A. Correct.

24 Q. Could you see the ambulance from the

1 on the roadway?

2 A. No, I don't think so.

3 Q. I think you had testified earlier
4 that it was quite obvious to you as to the
5 condition of the road or driveway; is that
6 correct?

7 A. Yes.

8 MS. HANNIGAN: I have nothing
9 further for now. Thank you.

10

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13 EXAMINATION BY MR. FOX:

14 Q. My name is Bruce Fox and I represent
15 Carolyn and Bruce Whitney who are also
16 property owners who have been sued in this
17 case as well.

18 Just a couple of questions. First
19 of all, are you here today because you
20 received a subpoena to come and testify?

21 A. Oh, yes.

22 Q. And, sir, what is your date of birth?

23 A. 8/1/71.

24 Q. And once you got the subpoena and in